

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICHAEL JOSEPH DAVIS JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11712
Trial Court No. 3AN-13-2011 CR

MEMORANDUM OPINION

No. 6392 — October 26, 2016

Appeal from the District Court, Third Judicial District,
Anchorage, Brian K. Clark, Judge.

Appearances: Douglas Moody, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
A. James Klugman, Assistant District Attorney, Anchorage, and
Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge ALLARD.

A jury convicted Michael Joseph Davis Jr. of two counts of violating the conditions of his bail release — specifically, the condition that prohibited him from consuming alcohol while on release.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Davis appeals, asserting two claims of error. First, he argues that the district court did not adequately address his claim that his attorney had a conflict of interest. Second, he argues that the court committed plain error by failing to clarify that the jury was required to find that he knowingly consumed alcohol.

For the reasons explained here, we conclude that the district court's response to the purported conflict was adequate. We also conclude that, given the manner in which this case was litigated, the jury instruction was not plain error. We accordingly affirm Davis's convictions.

Facts and proceedings

On February 21, 2013, two Anchorage police officers were dispatched to an apartment where Davis was staying. The officers observed that Davis was wearing an ankle monitor and that he appeared to be intoxicated. According to the officers, Davis had bloodshot watery eyes, slurred speech, balance problems, and an odor of alcohol on his breath. One of the officers also testified that Davis admitted that he had been drinking alcohol.

At the time, Davis was on bail release in two separate cases. His conditions of release in both cases prohibited him from possessing or consuming alcohol. Based on their observations and Davis's alleged admission, Davis was charged with two counts of violating the conditions of his release.¹

At trial, Davis's defense was that he had not consumed any alcohol. The defense attorney argued that Davis's apparent intoxication was instead caused by prescription medications. The defense attorney also argued that the observations of the officers were not enough to convict Davis of actually consuming alcohol. In his closing

¹ AS 11.56.757(b)(1), (2).

argument to the jury, Davis's attorney emphasized that the case was "about one thing, and one thing only: Was Michael Davis drinking alcohol on February 21st of this year?"

The jury subsequently convicted Davis of both counts of violating the conditions of his release.

After the jury returned its verdicts, Davis's mother submitted an affidavit to the court alleging that, during the trial, she overheard Davis's defense attorney tell an intern that the prosecutor had coached his daughter's high school mock trial team. In the affidavit, Davis's mother asserted that she "perceive[d] this to be a huge and extreme professional conflict of interest to [her] son[']s case," and she asked that "the appropriate action ... be taken."

The trial judge, District Court Judge Brian K. Clark, inquired into this alleged conflict of interest at Davis's sentencing hearing. The prosecutor confirmed that she had coached the defense attorney's daughter's high school mock trial team. The prosecutor also said that she had very limited contact with the defense attorney and did not think that she and the defense attorney had "even had friendly conversation ... other than hello and goodbye" during the time the defense attorney's daughter was on the team. The prosecutor added that, although she was still the mock trial coach at the high school, the defense attorney's daughter had since graduated.

The defense attorney also acknowledged that the prosecutor had coached his daughter's high school mock trial team, and that their personal interaction was minimal. The attorney stated that he did not believe that this limited association had affected his performance as a defense attorney in any way and that it had not occurred to him that this association could be perceived as a conflict of interest.

The defense attorney indicated, however, that Davis believed that it was a conflict and therefore the attorney was moving for a new trial and for substitute counsel on Davis's behalf.

After listening to the defense attorney and the prosecutor, the judge stated that he did not view the association between the defense attorney's daughter and the prosecutor to create any sort of conflict of interest. He agreed, however, that "out of an abundance of caution" he would appoint the Office of Public Advocacy (OPA) "to determine whether or not [the defense attorney] had a conflict [of interest]."

The Office of Public Advocacy interpreted the judge's order as an appointment to act as a neutral investigator and to report the results of its investigation to the court.² An attorney from OPA subsequently spoke to Davis, the defense attorney, and the prosecutor and then reported on these conversations to the court. The OPA attorney indicated that she had not discovered any new facts during her investigation and that she agreed with the court's original conclusion that there was no conflict of interest justifying appointment of substitute counsel or a new trial.

The district court judge affirmed his earlier ruling that there was no conflict and denied Davis's motion for a new trial.

This appeal followed.

The trial court responded adequately to the conflict claim

On appeal, Davis argues that the district court failed to properly inquire into his assertion that his trial attorney had a conflict of interest based on the prosecutor's coaching of the attorney's daughter on the mock trial team. Davis asserts that the court should have held a full evidentiary hearing on this matter and that the court should have appointed substitute counsel to represent his interests at the evidentiary hearing.

² We express no opinion as to whether this was a proper interpretation of the court's order or whether it was appropriate for OPA to act as a neutral investigator in this fashion.

But, as we explained in *Jerrel v. State*, when the defendant “fail[s] to articulate or substantiate any colorable ground for a legal conflict,” it is not an abuse of discretion for the trial court to resolve the matter without appointing conflict counsel.³

Here, the court was responsive to Davis’s concerns, and the court took appropriate steps to address those concerns by conducting an on-the-record inquiry regarding the nature and extent of the prior association between the prosecutor and the defense attorney’s daughter. During this inquiry, it became clear that there were no material facts in dispute. The prosecutor and the defense attorney both freely admitted the prior association, and both attorneys confirmed the limited nature of the prior association and its irrelevance to Davis’s case.

Based on this on-the-record inquiry, the court concluded that Davis had failed to show any colorable claim of a conflict of interest and no further proceedings or appointment of counsel were therefore necessary.⁴

On appeal, Davis points out that the district court did more than just hold an on-the-record inquiry; it also appointed OPA to independently investigate the conflict claim. Davis contends that this appointment was error and that, if the court believed that

³ *Jerrel v. State*, 851 P.2d 1365, 1372 (Alaska App. 1993); *see also State v. Torres*, 438 A.2d 46, 52 (Conn. 1980) (“For the purpose of determining whether to hold an evidentiary hearing, the court should ordinarily assume any specific allegations of fact to be true. If such allegations furnish a basis for withdrawal of the plea ... and are not conclusively refuted by the record ... then an evidentiary hearing is required.”).

⁴ *See, e.g., United States v. Hemminger*, 1993 WL 339310, at *2 n.3 (N.D. Ill. 1993) (unpublished) (“The allegations that petitioner’s attorney and the prosecutor were personal friends and members of the same church, even if true, do not demonstrate a conflict of interest.”); *Hamilton v. Hood*, 806 F.Supp. 429, 436 n.6 (S.D.N.Y. 1992) (stating that petitioner’s allegation that his appellate counsel had a conflict of interest because he was a “friend and former co-worker” of the chief assistant district attorney did “not remotely support a claim of conflict of interest”).

further proceedings were required, the proper procedure was to appoint OPA as substitute counsel and hold a full evidentiary hearing.

But the record indicates that the OPA appointment was made only “out of an abundance of caution” and the record further indicates that the OPA investigation did not result in any new information for the court to consider. Given these circumstances, we conclude that any error in appointing OPA in this investigative capacity was harmless.

The jury instruction concerning the culpable mental state was not plain error

Alaska Statute 11.56.757(a) provides:

[A] person commits the crime of violation of condition of release if the person (1) has been charged with a crime or convicted of a crime; (2) has been released under AS 12.30; and (3) violates a condition of release imposed by a judicial officer under AS 12.30, other than the requirement to appear as ordered by a judicial officer.

Because this statutory definition lacks a requisite culpable mental state, the default culpable mental states provided by AS 11.81.610 apply. Under AS 11.81.610, the State must prove that the defendant acted knowingly with regard to the conduct that violated the conditions of release — that is, the defendant acted knowingly with regard to the possession or consumption of alcohol. And the State must also prove that the defendant acted recklessly as to the possibility that his conduct (knowingly possessing or consuming alcohol) violated his court-ordered conditions of release.⁵

⁵ AS 11.81.610(b).

In Davis's case, the court instructed the jury that:

To prove that the defendant committed [the crime of violating a condition of release], the state must prove beyond a reasonable doubt each of the following elements:

- (1) the defendant was charged with a [felony or misdemeanor];
- (2) the defendant was released on bail with conditions of release set by a judicial officer; and
- (3) the defendant knowingly engaged in an act that violated the terms of his release, and he either knew of or recklessly disregarded the risk of such violation.

Davis did not object to this instruction at the time.

On appeal, however, Davis argues that it was plain error for the court to give this instruction because, according to Davis, the last part of the instruction was ambiguous. Davis asserts that the jury may have been confused by the last element and may have mistakenly believed that it could convict Davis even if he was only reckless as to the fact that the substance he consumed was alcohol.

We disagree with Davis that the instruction is ambiguous in the manner that he claims. The instruction specifically required the jury to find that Davis "*knowingly* engaged in an act [*i.e.*, possessing or consuming alcohol] that violated the terms of his release." We conclude that the instruction therefore adequately informed the jury that Davis had to know that he drank alcohol.

Moreover, even if we were to find the last element ambiguous on this issue, we would not find plain error in the context of this case. Here, Davis's defense at trial was that he had consumed prescription drugs, not alcohol, and he argued that the officers mistook the signs of impairment caused by the drugs as symptoms of alcohol intoxication. But Davis never suggested, either in his trial testimony or in argument, that he may also have unwittingly consumed alcohol. Given this record, we conclude that the jury would not have been misled by any latent ambiguity in the jury instruction.

Conclusion

We AFFIRM the judgment of the district court.